UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,
Employer

and **Case 13-RC-121359**

COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA)
Petitioner

BRIEF OF *AMICI CURIAE* BROWN UNIVERSITY, COLUMBIA UNIVERSITY, CORNELL UNIVERSITY, DARTMOUTH COLLEGE, HARVARD UNIVERSITY, UNIVERSITY OF PENNSYLVANIA, PRINCETON UNIVERSITY, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, YALE UNIVERSITY, ASSOCIATION OF AMERICAN UNIVERSITIES

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July 3, 2014

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I. Introduction and Statement of Interest

Amici universities are major research universities in the United States. *Amicus* Association of American Universities is an organization of 60 United States and two Canadian leading research institutions committed to developing strong national and institutional policies supporting research and both graduate and undergraduate education. They all have a profound interest in the status of the thousands of graduate student assistants who pursue advanced degrees in their or their members' institutions.

Amici submit this brief in response to the second question raised in the Board's Notice and Invitation to File Briefs in this matter:

> Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis?

Amici vigorously oppose any attempt by the Board to revisit *Brown* in this case. Simply put, a case involving undergraduate football players who were found by the Regional Director not to play football as an integral part of their degree programs is not the proper vehicle by which to reconsider the status of graduate teaching and research assistants who undertake such activities as part of their degree program.

Brown was not decided in a vacuum and should not be reconsidered in a vacuum. It was based on an exhaustive record which focused on the exclusive subject at hand: the status of graduate student assistants at that university. In reaching its decision, the Board evaluated a comprehensive factual record specifically developed to address the variety of factors relevant to that context. These factors included the status of graduate student assistants as students, the role of graduate student assistantships in graduate education, the graduate student assistants'

relationship with the faculty, and the financial support they receive to attend Brown. The Board concluded that the relationship between the graduate student assistants and Brown is primarily an educational rather than an economic one.

The *Brown* majority drew its legal conclusions from the facts before it, carefully limited its holding to graduate student assistants, and did not presume to extend its reasoning or conclusions to other categories of students.

A crucial factor in *Brown* was the integration of teaching and research into the graduate educational programs. They were inextricably woven into the fabric of graduate education at the university, and the earned degree, the PhD, as its central mission prepares students for academic, scientific or research careers that combine research and teaching. For this reason, there is an important factual distinction between *Brown* and the present case.

The Board has made its interest in revisiting the *Brown* decision clear. The Notice and Invitation in this matter represents the second time in as many years that the Board has invited *amici* to address whether *Brown* should be modified or overruled. *See* NYU II, Notice and Invitation, June 22, 2012. However, in the current matter, the critical parties in interest – the nation's private sector research universities and the graduate students who study at these universities – are not parties to the litigation and may *only* argue their positions as *amici*.

Depriving these parties of the opportunity to participate fully in litigation raises grave concerns. First, if the Board chooses to overrule or modify *Brown* at this time, it will be making a decision that may shape the future of private sector graduate education in this country without the benefit of any record. In its oft-criticized history of reversals of precedent, the Board has been careful to do so only where the facts before it parallel the facts in the underlying case it is reconsidering, and where there has been an opportunity for the real parties in interest to create a

full evidentiary record. This has been particularly true in cases dealing with students. Second, the prospect of a reversal in these circumstances would undermine the Board's legitimacy and be an affront to the basic tenets of due process.[1]

As an entity within the Executive branch, the Board may, within its discretion, overturn precedent that it believes was wrongly decided, and may even be eager to do so. But eagerness alone, in the absence of any pending factually analogous case, is no justification for such action. Whenever the Board has reconsidered its major precedents, it has only done so after careful consideration of the arguments of the parties and a full record. The Board has not simply reconsidered a major precedent as an appendage to a different issue in a different factual context.

Therefore, *amici* encourage the Board to decide the status of undergraduate grant-in-aid football players solely on the facts in the record. There is no legitimate legal or procedural reason to reconsider *Brown.* No court has remanded the issue of graduate student education to the Board for reconsideration; no case addressing the status of graduate student assistants at private universities has reached the Board in the ten years since *Brown* was decided; and Congress has not seen fit to reverse or modify it. A change in the Board majority is not enough.

II. This Case Provides No Factual Record to Support a Reconsideration of Brown.

The Regional Director distinguished *Brown* on factual grounds. Reciting the four factors relied on by the Board in *Brown,* he held that "…this statutory test is inapplicable in the instant case because the players' football-related duties are unrelated to their academic studies unlike the

[1] Member Hayes voiced similar concerns in his dissent from the Board's Order granting review in *New York University*, Case 02-RC-023481 (6/22/2012), in which he stated that "Even absent any supplemental information or argument of significance, there is the distinct possibility that my colleagues will change the law in this area for the third time in twelve years. Such a course would tend to undermine both the predictability inherent in the rule of law as well as the Board's credibility. It would also impermissibly distort both labor relations and student relations stability in the higher education industry." The present case invites the prospect of reversing *Brown* without *any evidence at all* about graduate student assistants.

graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements…" (R.D. Decision at 18).

Likewise, the Petitioners in their Response to Request for Review of Regional Director's Decision and Direction of Election plainly acknowledged that *Brown* involved a "very different context [than] presented here." Petitioner's Response, p. 24.

The specific facts bearing on the relationship between Northwestern and its grant-in-aid undergraduate football players differ extensively from the experience of graduate student assistants – whether at Northwestern or anywhere else, for that matter. In these circumstances, it would be irresponsible for the Board to re-evaluate graduate teaching and research assistants' relationships with their degree programs without a scintilla of evidence on that issue in the record.[2]

III. The Board Does Not Reconsider or Reverse Precedent Arbitrarily or in the Absence of a Full Record.

Amici recognize that the nature of the Board's political composition inevitably leads to reversals of policy; changes in policy are embedded in the Board's DNA. As the majority stated in one notable reversal, *Midland National Life Insurance Co.*, 262 NLRB 127 (1982), reversing *General Knit*, 239 NLRB 619 (1978) and *Hollywood Ceramics*, 140 NLRB 221 (1962) on the issue of campaign misrepresentations:

> In reaching this decision, we note that 'administrative flexibility is…one of the principal reasons for the establishment of the regulatory agencies [because it] permits valuable experimentation and allows administrative policies to reflect changing policy views.' *Boyd Leedom, et. al. v. International Brotherhood of*

[2] *Brown* was decided on the basis of an extensive record developed during almost thirty days of hearings. Reconsideration of *Brown*, if at all, should only arise in a case squarely presenting facts about the graduate student assistants at the university subject to a representation petition.

> *Electrical workers, Local Union No. 108, AFL-CIO*, 278 F.2d 237, 243 (D.C. Cir. 1960). As is obvious from today's decision, the policy views of the Board have changed. We cannot permit earlier decisions to endure forever if, in our view, their effects are deleterious and hinder the goals of the Act. The nature of administrative decisionmaking relies heavily upon the benefits of the cumulative experience of the decisionmakers. Such experience, in the words of the Supreme Court, 'begets understanding and insight by which judgments … are validated and qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.' *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). 262 NLRB at 132.[3]

"Administrative flexibility," however, does not mean using the facts of one case as an expedient to reverse a factually distinguishable case. The Board's public invitation to *amici* to opine on *Brown's* applicability to the present case suggests that the current Board may be inclined to do just that.

The only commonality between the *Northwestern* case and the *Brown* case is that the individuals in dispute are students at a private University. *Amici* submit that the Board must confine its decision to the status of the undergraduate football players before it, without reaching consideration of the graduate student assistants who are not before it.

In an adversarial system of law, it is up to the parties—not the decision-maker—to frame the issues:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party

[3] *See also* Member Liebman's dissent in *MV Transportation*, 337 NLRB 770, 776 (2002): "'Regulatory agencies do not establish rules of conduct to last forever; they are supposed, *within the limits of the law and of fair and prudent administration*, to adapt their rules and practices to the Nation's needs in a volatile changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.' *American Trucking Assns. V. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967) (emphasis supplied).

> presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Bradley Scott Shannon, *Some Concerns About Sua Sponte*, 73 OHIO STATE L. J. FURTHERMORE 27, 32 (2012) *citing Greenlaw v. United States*, 554 U.S. 237, 244 (2008).

In the present case, it appears that the Board – the decision-maker - rather than the parties in interest, raised the question of the possible modification or reversal of *Brown.* The Board's request for *amicus* briefs raised the question whether to modify or overrule "the test of employee status" applied in *Brown*.[4] The question of reversal was not prompted by the parties. Northwestern insists that, based on the record evidence, the football players have a primarily educational relationship with the university. Northwestern does not seek modification of *Brown.* For their part, petitioners distinguish *Brown*, and then, almost as an aside, suggest that it should be reconsidered:

> Brown was wrong, but Northwestern would be wrong even if *Brown was right.* If the Board grants review, *Brown* should be reconsidered. Only if the Board were to reaffirm *Brown* would it be necessary to consider whether *Brown* should be extended to the very different context presented here. Response to Request for Review, at 24.

A mere two sentences in a thirty-page Response to Request for Review, emphasizing the *difference* between *Brown* and the facts in *Northwestern,* hardly qualifies as a call for reversal of *Brown.*

[4] It is noteworthy that there was no single "test" employed in *Brown*. As noted earlier, the Board took into account a variety of considerations in reaching the conclusion that the graduate student assistants in question were not employees within the meaning of the Act. *Amici* submit that the Board cannot reconsider, modify or reverse the *Brown* "test" without an evidentiary record.

IV. The History of Litigation Concerning Student Status Demonstrates that the Board Confines Itself to the Facts Concerning the Category of Student it is Considering.

Restraint is a *sine qua non* of adjudication, whether at the agency level or before the courts, particularly where the relevant facts are not before the decision-maker. As Justice Blackmun said:

> I agree with the Court… that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s]."… Clearly, the Court was eager to decide this case. But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1045 (1992) (J. Blackmun, dissenting). This same requirement of restraint is directly applicable to the Board. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981) ("If an Article III court cannot assume jurisdiction to protect an abstract right, a board which is the creature of limited statutory authority, *a fortiori*, cannot be said to possess such extensive power.")

The *Brown* decision itself exemplifies the Board's restraint when reviewing cases involving student status. The majority reviewed the history of cases pertaining to graduate students, *Adelphi University*, 195 NLRB 639 (1972) and *Leland Stanford*, 214 NLRB 621 (1974), and noted that the Board in *Adelphi* had distinguished the *graduate student assistants* from the *research associates* found to be employees in *C.W. Post Center of Long Island*, 189 NLRB 904 (1971) . *Brown*, 342 NLRB at 486-487. The majority also noted that in *St. Clare's Hospital*, 229 NLRB 1000 (1977), the Board "…carefully delineated *several categories of Board cases involving students*, including those students who perform services at an educational

institution where those services are directly related to the university's educational programs." *Brown*, 342 NLRB at 491 (emphasis supplied).

The majority in *Brown*, while criticizing the reversal of *St. Clare's Hospital* and *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976) in *Boston Medical Center*, 330 NLRB 152 (1999), was careful to distinguish the facts before it from the related issue of house officers. The majority pointedly stated "[t]hat the Board in *Boston Medical Center* did not address the status of graduate assistants who have not received their academic degrees. In the instant case, the graduate assistants are seeking their academic degrees and, thus, are clearly students." 342 NLRB at 487. Hence, the majority concluded that "We need not decide whether *Boston Medical* (where the opposite is true) was correctly decided." Id.

The dissent in *Brown* also limited its attack on the majority to the case of graduate student assistants and no others:

> Seeking to avoid the consequences of overruling such a recent precedent, the majority contends that *Leland Stanford* itself was consistent with a decision that came before it, *Adelphi University.* In fact, until today, the Board has never held that graduate teaching assistants (in contrast to certain research assistants and medical house staff) are not employees under the Act and therefore should not be allowed to form bargaining units of their own – or, indeed, enjoy any of the Act's protections. 342 NLRB at 495.

The Board's history of litigation concerning students reflects careful attention to the specific student experience in the case before it. Although the *Brown* Board concluded that the graduate assistants at Brown had a primarily educational rather than economic relationship with the university, it did not venture beyond the record before it. In the present case, in which Northwestern argues that the Board should conclude on the elaborate record before it that the undergraduate football players' relationship with Northwestern is primarily educational, there is

no basis upon which to reach any conclusions about graduate student assistants or to reconsider factors which led the Board to its decision in *Brown.*

In other words, absent a full record, the evaluation of the employment status of undergraduate football players at Northwestern should not determine the employment status of graduate student assistants elsewhere, any more than it should determine the employment status of undergraduate work-study students, student interns, or any other category of students.

The Board's insistence on developing a full evidentiary record in cases involving a particular category of students was also exhibited in the most recent case involving graduate student assistants, that of *New York University*, 356 NLRB No. 7 (2010) in which the Board majority, Member Hayes dissenting, granted the petitioner's request for review of a Regional Director's dismissal without a hearing, based on *Brown*, of a petition for a unit of graduate teaching and research assistants.[5] The majority stated:

> …unlike our colleague, we are unwilling to find, in the absence of any evidence, that the graduate students who have been appointed as adjunct faculty "are currently represented" and that the instant petition is therefore inappropriate. *Factual findings must be based on evidence; since no evidence was presented, a remand for a hearing is necessary*. Id. at 1 (emphasis supplied).

A different Board majority refused to grant review – based on *Brown* – of a Regional Director's direction of an election among a unit of house staff:

> We reject the Employer's argument that our decision in *Brown* compels us to reevaluate *Boston Medical Center*. *Boston Medical Center* has been the law for over a decade, and no court of appeals has questioned its validity. …

[5] Following a hearing and the grant of a request for review of the Regional Director's decision, the case was settled prior to a Board decision, thereby depriving the Board of the opportunity to reconsider *Brown.*

> In *Brown*, the Board determined that university teaching assistants (TAs) and research assistants (RAs) were not statutory employees. Yet the Board expressly declined to extend its reasoning in that case to house staffs. Id. at 483 fn.4, 487, 489 fn. 25
>
> The decision in *Brown* was based on a factual analysis of what TAs and RAs actually do. It is apparent that the role of TAs and RAs at universities is different from that of house staff at medical centers. *St. Barnabas Hospital*, 355 NLRB No. 39 (2010).

In light of the refusal of Board majorities from both sides of the aisle to use any case involving one category of students as a vehicle to reconsider or reverse precedent involving a *different* category of students, doing so in the present case would be an unwarranted departure from Board practice.

V. The Board Refrains From Modifying or Overruling Precedent Where the Facts Before it Are Not Substantially Aligned.

"The Board has wide discretion to interpret the Act as it wishes. The Act is written in broad statutory terms. Congress left it to the Board 'to develop and apply fundamental national labor policy…[The] function of striking [the balance between competing interests] is often a difficult and delicate responsibility which the Congress committed primarily to the [Board].'" Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 Am. U. Labor & Emp. L.F. 67, 70 (2011). There are practical, prudential, and historical limits, however, to the Board's discretion to reverse the precedent set by a prior Board.

A careful review of Board cases demonstrates that in virtually every single instance in which the Board has reversed precedent, it has done so in cases which mirror the essential facts in the case being reconsidered, and in which a full record has been created.

Cases reflecting the Board's recurrent reversals are illustrative. They all involve similar, uncontroverted facts. The outcome changed because the Board majority changed. See, e.g., *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), reversing *Greenhoot, Inc.*, 205 NLRB 250 (1973) on the issue of whether employees of joint employers may be in the same bargaining unit. *Sturgis* was subsequently reversed in *Oakwood Care Center*, 343 NLRB 659 (2004); *Epilepsy Foundation*, 331 NLRB 676 (2000), reversing *E.I. DuPont & Co.*, 289 NLRB 627 (1988) on the issue of Weingarten rights of non-union employees. *Epilepsy* was subsequently overruled by *IBM Corp.*, 341 NLRB 1288 (2004); *Springs Industries, Inc.*, 332 NLRB 40 (2000), reversing *Kokomo Tube Co.*, 280 NLRB 357 (1986) on the issue of employer threats of plant closure. *Springs Industries* was overruled by *Crown Bolt, Inc.*, 343 NLRB 776 (2004); *St. Elizabeth Manor*, 329 NLRB 341 (1999), reversing *Southern Moldings*, 219 NLRB 119 (1975) on the question of an incumbent union's entitlement to continuing majority status in a successorship situation. *St. Elizabeth Manor* was reversed in *MV Transportation*, 337 NLRB 770 (2002).

The Board does not reconsider cases *sua sponte*, and Board members resist doing so before a legitimate opportunity for reconsideration arises. [6]

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[6] *See, e.g. Toering Electric Co.*, 351 NLRB 225 (2007) which modified the standards applicable to discriminatory refusals to hire "salts." Members Liebman and Walsh, in dissent, objected to reconsideration of precedent "[w]ithout the benefit of briefs, oral argument or even a request to reconsider precedent…" 351 NLRB at 238; *Marriott Hartford Downtown Hotel*, 347 NLRB 865 (2006), in which a Board majority granted review in a case raising the same factual issues as *New Otani Hotel & Garden*, 331 NLRB 1078 (2000) (addressing card checks). Members Liebman and Walsh objected to review, arguing that "…this is the wrong case in which to reexamine [the *New Otani]* precedent…The present case is distinguishable… Re-examining the Regional Director's decision and its solid legal underpinnings will serve no purpose but to interfere with, and potentially weaken, well-established worker rights to organize." 347 NLRB at 867; *Saint Gobain Abrasives*, 342 NLRB 434 (2004) (overruling *Priority One Services*, 331 NLRB 1527 (2000) (the majority, over Member Liebman's and Walsh's objection, remanded the case because "genuine factual issues require a hearing…," 342 NLRB at 434; *Custom Deliveries, Inc.*, 315 NLRB 1018 (1994), in which the Board reconsidered and modified *Rheingold Breweries*, 162 NLRB 384 (1966) because the facts in both cases were the same: "The instant case is the first published Board decision since *Rheingold* which clearly raises the issue presented there. We therefore have decided to reexamine the *Rheingold* doctrine." Id. at 1019, fn. omitted; *Centurion Auto Transport, Inc.*, 329 NLRB 394 (1999), Member Liebman noting that the "…issue in this case highlights certain conflicts between current case law and emerging forms of labor participation

VI. Reconsideration of the *Brown* Decision Without a Full Evidentiary Record Would Undermine the Reliability and the Integrity of the Board.

The *Brown* decision has spawned years of debate and publicity regarding the relationship between private sector graduate student assistants and their universities. If the decision were to be modified or overruled as it applies to graduate student assistants, the result would inevitably lead to extensive appellate litigation, possible Congressional action and certain controversy. To do so without having a full record and the participation of at least one affected university would be patently unfair to the real parties in interest. Such a break with the Board's unvarying history of reconsidering precedent where the facts before it are similar to the underlying precedent at issue would rightly be perceived as an arbitrary, result-oriented decision.

Modifying or reversing *Brown* in these circumstances would also contribute to public and Congressional cynicism about the Board's legitimacy. As former Chief Counsel Datz stated when articulating the arguments against reversal of precedent:

> A reversal of precedent results in instability, unpredictability and uncertainty in the law. Employers, employees, and unions cannot act in reliance on the law, for it may change. What is lawful today may be unlawful tomorrow and vice-verse. Further, lawyers run the risk that their best advice will have disastrous consequences based on such reliance. Finally, our society prides itself on being a nation of laws. Where precedent changes simply because a different political group is in power, the public becomes cynical about our ideals and disrespectful of the law." Datz, *supra*, at 71. [7]

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in corporate decision making. Given the single-employer finding [in this case], however, she finds it is unnecessary to reexamine Board doctrine on employee ownership in this case." Id. at 398, n. 16.

[7] *See also* Member Hayes' dissent in *New York University, 356 NLRB No. 7* "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 fn.30 (1987) (citations and internal quotations omitted). Id., fn. 1.

Similarly, Member Hurtgen dissenting in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), which overruled *Celanese Corp.*, 95 NLRB 664 (1951), asserted:

> In my view, there are values that are inherent in the doctrine of *stare decisis*. These values include stability, predictability, and certainty of the law. In the context of labor relations law, these values are outweighed only upon a clear showing that extant law is contrary to statutory principles, disruptive to industrial stability, or confusing. That showing has not been made. Although there are references to industrial stability, there are no empirical data to support these references. Moreover, the invocation of industrial stability as a determinative criterion is highly problematic in situations which are the subjects of this decision….Id. at 731.

For these reasons, great care should be taken before a new Board majority reverses precedent. It is axiomatic that there should be a full evidentiary record, factual similarity to the decision being reconsidered, and the opportunity for the real parties in interest to be heard. None of those conditions present themselves at this time. First, the factual record that Northwestern and the players have carefully created in this case has nothing to do with the relationship between private universities and their graduate student assistants. Second, there is no history at all before the Board or the courts of any problems in the application of *Brown* in the ten years since it was decided. No case ripe for reconsideration has reached the Board. Congress has not acted to overrule *Brown*, nor has any empirical evidence been presented to the Board that would even begin to suggest that the *Brown* decision is wrongly decided.

Finally, overruling or modifying *Brown* where there is no current graduate student assistant case now pending deprives the parties in interest of their rightful day before the Board. The overruling or modification of an important precedent under these circumstances is a dangerous break from the Board's historical practice and should not be permitted.

VII. Conclusion

For all the foregoing reasons, this case provides no occasion for the Board to reconsider, overrule or modify its decision in *Brown*.

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Date Submitted: July 3, 2014

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